TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted]266

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

vs.

JAMES W. McELVAIN AND FRANK CROZIER

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

FILED JANUARY 19, 1926

(31608)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 885

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

vs.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

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1 [Caption omitted.]

2 In United States District Court for the Northern District of Illinois, Eastern Division

THE UNITED STATES
12796 vs.
JAMES W. McELVAIN and FRANK CROZIER and CHARLES H. HOY

Order to file indictment

Oct. 3, 1924

Comes the grand jury this day and return in open court an indictment against James W. McElvain, Frank Crozier, and Charles H. Hoy, the defendants herein, whereupon on motion of the United States attorney it is ordered by the court that said indictment be filed and the cause placed upon the dockets of this court; that the amount of the bail bonds be fixed at the sum of five thousand dollars for each defendant.

3 [Copy]

In United States District Court

Indictment

Filed Oct. 3, 1924

NORTHERN DISTRICT OF ILLINOIS,
Eastern Division, ss:

The grand jurors for the United States of America empaneled and sworn in the District Court of the United States for the Eastern Division of the Northern District of Illinois at the September term of said court in the year 1924, and inquiring for said division and district, upon their oath present, that on, to wit, March 14, 1921, James W. McElvain and Carley H. Hoy, hereinafter referred to as defendants, late of the city of Chicago, in said division and district, were president and manager, respectively, of a corporation organized, existing and doing business under and by virtue of the laws of the State of Illinois, known as the Freeman Coal Mining Company; that the said corporation was a corporation required by an act of Congress, entitled "An act to provide revenue and for other purposes," approved February 24, A. D. 1919, and known as the revenue act of 1918, to make and file with the collector of internal revenue of the eighth internal revenue collection district of Illinois, in which district was located said corporation's principal place of business and principal office, its corporation income and profits tax return for

the calendar year ended December 31, 1920, verified under oath by its president, vice president, or other principal officer and by its treasurer or assistant treasurer, stating specifically the items of its gross income and the deductions and credits allowed by the provisions of the aforesaid act and the regulations theretofore issued thereunder by the Commissioner of Internal Revenue of the United States; that the said Freeman Coal Mining Company was not a corporation exempt from taxation under the provisions of the said revenue act of 1918.

4 And the grand jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, to wit, from January 1, A. D. 1920, continuously down to and including the first day of April, A. D. 1921, and prior to the finding of this indictment, in the city of Chicago, State of Illinois, and in said eastern division of the said northern district, and within the jurisdiction of this court, the said defendants, James W. McElvain, Carley H. Hoy, and one Frank Crozier, late of the city of Chicago, attorney for said Freeman Coal Mining Company, hereinafter also referred to as a defendant, did knowingly, willfully, and unlawfully confederate, conspire, and agree together and with each other to defraud the United States, the said conspiracy being more particularly set forth as follows, that is to say:

That said defendants conspired and agre d together and with each other that they, the said defendants, would prepare and cause to be prepared an incorrect, false, and fraudulent income and profits tax return for the calendar year 1920, for and on behalf of the said Freeman Coal Mining Company, which said income and profits tax return should show that the gross income of the said Freeman Coal Mining Company for the said calendar year 1920 was, to wit, $191,643.87, well knowing that the true and correct amount of gross income of said corporation for said year was an amount greatly in excess of said amount of $191,643.87, to wit, $264,137.37; that the deductions allowed by law were, to wit, $104,754.84, well knowing that the said amount of $104,754.84 was an amount greatly in excess of the true and correct amount of deductions allowed to said corporation by law, which amount was, to wit, $65,192.18; that the net income was $86,889.03, well knowing that the true and correct amount of net income of said corporation was an amount greatly in excess of said amount of $86,889.03, to wit, $198,945.19, and the amount of tax to be paid, to wit, $26,482.50, well knowing that the true and correct amount of tax due from said corporation was an amount greatly in excess of said amount of $26,482.50, to $81,162.60; and it was further a part and portion of said unlawful con-

5 spiracy, confederation, and agreement entered into by said defendants that the books of account of the said corporation, the Freeman Coal Mining Company, upon which the said return was based, should not disclose the total amount of sales made by

the said company, and that said books should show certain amounts as expense, to wit, commissions and salaries, which, as each of the defendants then and there well knew, had not been expended by said corporation as commissions and salaries; and it was further a part and portion of said unlawful conspiracy heretofore entered into, as aforesaid, that the said incorrect, false, and fraudulent income and profits tax return so to be prepared, as aforesaid, should be sworn to as required by the said revenue act of 1918 and that the said defendant, James W. McElvain, who was then and there president of the said corporation, should swear that said income and profits tax return of said corporation for the said calendar year of 1920, which said defendants then and there well knew was incorrect, false, and fraudulent, was a true and complete return; and it was further a part and portion of said unlawful conspiracy, confederation, and agreement entered into by said defendants that the said incorrect, false, and fraudulent income and profits tax return of the said corporation for the said calendar year of 1920, after being so prepared and sworn to, as aforesaid, should be filed with the collector of internal revenue for the eighth district of Illinois and that taxes should be paid to the said collector, as shown thereon, which said return, the defendants and each of them then and there well knew, was not a true and complete return showing the correct amount of income and profits taxes payable to the United States by said corporation for the said calendar year 1920, and each of said defendants then and there well knew there was payable to the United States by said corporation for the said calendar year of 1920 as income and profits tax a sum greatly in excess of the said $26,482.50, to wit, $81,162.60, thereby defrauding the United States out of the amount of, to wit, $54,680.10.

6 OVERT ACTS

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that in pursuance of said unlawful conspiracy, confederation, and agreement and to effect the object thereof the said defendants, at the several times and places hereinafter mentioned, did certain acts, that is to say:

1. Said defendant, James W. McElvain, under the name and style of Jas. W. McElvain, as such president, of said Freeman Coal Mining Company, did, on March 14, 1921, in the city of Chicago, Illinois, in the division and district aforesaid, subscribe, and swear to said incorrect, false, and fraudulent corporation income and profits tax return of said corporation for the calendar year 1920.

2. That the said defendant, Frank Crozier, as such attorney for the said corporation, did, at Chicago, Illinois, in the division and district aforesaid, on, to wit, March 14, 1921, at Chicago aforesaid, inspect, examine, and approve said corporation income and profits tax return.

3. That said defendants, James W. McElvain and Frank Crozier, as such president and attorney aforesaid, at Chicago aforesaid, and within the jurisdiction of this court, on, to wit, March 14, 1921, file and cause to be filed with the collector of internal revenue for the eighth internal-revenue collection district of Illinois said incorrect, false, and fraudulent income and profits tax return of said Freeman Coal Mining Company for the calendar year of 1920.

4. That said defendants, James W. McElvain, Carley H. Hoy, and Frank Crozier, as such president, manager, and attorney, respectively, of said Freeman Coal Mining Company, did, at Chicago aforesaid, throughout the year 1926, cause one Robert Heron, who was then and there bookkeeper of the said Freeman Coal Mining Company, to fail to record on the books and records of the said corporation sales to the amount of, to wit, $27,895.00, and in that manner cause the books and records of the said Freeman Coal Mining Company upon which said return was based to be false and incorrect and to show that the sales of the said Freeman Coal Mining Company, were, to wit, $27,895.00 less than they were in truth and in fact.

7

5. That said defendants, James W. McElvain, Carley H. Hoy, and Frank Crozier, as such president, manager, and attorney, respectively, of said Freeman Coal Mining Company, did, at Chicago aforesaid, throughout the year 1920 cause one Robert Heron, who was then and there bookkeeper of the said Freeman Coal Mining Company to fail to record on the books and records of the said corporation sales to the amount of, to wit, $44,598.50 and in that manner cause the books and records of the said Freeman Coal Mining Company, upon which said return was based, to be false and incorrect and to show that the sales of the said Freeman Coal Mining Company were, to wit, $44,598.50 less than they were in truth and in fact.

6. That said defendants, James W. McElvain, Carley H. Hoy, and Frank Crozier, did, throughout the year 1920, at Chicago aforesaid, and within the jurisdiction of this court, knowingly, willfully, and unlawfully cause to be given to one Robert Heron, the bookkeeper of said corporation, figures alleging that an amount of $10,637.98 had been paid by said corporation as commissions, well knowing that said sum had not been paid as commissions, thus causing the books and the income-tax return, which was based upon the figures as set out in said books, to be false and incorrect and to show deductions to the amount of $10,637.98, which sum, each of said defendants well knew, had not been paid out as commissions by said corporation.

7. That said defendants, James McElvain, Carley H. Hoy, and Frank Crozier, did, throughout the year 1920, at Chicago aforesaid, and within the jurisdiction of this court, knowingly, willfully, and unlawfully cause to be given to one Robert Heron, the bookkeeper of said corporation, figures causing him, the said Robert Heron, to believe that an amount of $1,800.00 had been paid out by said corporation as salary, well knowing that said sum had not been so paid

out as salary, thus causing the books of the said corporation
8 and the income-tax return, which was based upon the figures as set out in said books, to be false and incorrect, and show deductions for salary to the amount of $1,800.00, which sum, each of said defendants well knew, had not been paid out as salary by said corporation.

8. That said defendants, James W. McElvain, Carley H. Hoy, and Frank Crozier, on, to wit, March 14, 1921, at Chicago aforesaid, and within the jurisdiction of this court, did prepare and cause to be prepared said corporation income and profits tax return for the said Freeman Coal Mining Company for the calendar year 1920, well knowing that there had been omitted from said books large amounts of income, to wit, $27,895.00 and $44,598.50, and that there had been taken on said return the amounts of $10,637.98 and $1,800.00 as deductions, well knowing that said income had been made and received by the said corporation during the said calendar year and that the said amounts taken as deductions had not been expended as commissions and salary by the said corporation.

CONCLUSION

And so the grand jurors aforesaid, upon their oath aforesaid, do say that said defendants, at the various times and places and in the manner and form aforesaid, unlawfully and feloniously have conspired to defraud the United States; against the peace and dignity of the United States, and contrary to the form of the statute of the same in such case made and provided.

EDWIN A. OLSON,
United States Attorney.

9 [File endorsement omitted.]

10 In United States District Court

[Title omitted.]

Order setting cause

Feb. 9, 1925

Comes Edwin A. Olson, Esq., United States attorney; come also the defendants in their own proper persons, and said defendants, James McElvain, Charley H. Hoy, and Frank Crozier, being arraigned upon the indictment filed herein against them, each defendant pleads "not guilty" thereto.

Whereupon it is ordered by the court that this cause be and the same is hereby set for trial April 7th, A. D. 1925.

11 [Copy]

In United States District Court

[Title omitted.]

Plea of defendant Frank Crozier

Filed Oct. 23, 1925

And now comes Frank Crozier, one of the defendants in the above-entitled cause, and having heard the indictment in the above cause read, says that the United States of America ought not to further prosecute the said indictment against him, said Frank Crozier, because he says that the said indictment was not found nor the information instituted within three years next after the commission of the offense charged in the indictment or within three years after the commission of any overt act charged in the indictment, or within three years after the first of April, A. D. 1921.

And the said Frank Crozier further says that during all of said period from and after the commission of said alleged offense down to the date of the return of the indictment herein, this defendant was not absent from this district, being the district in which the above offense is charged to have been committed, and that this defendant has never been a fugitive from justice and that no complaint was instituted before a United States commissioner charging this defendant with the commission of the above offense.

12 This defendant, Frank Crozier, further says that at and prior to the time when the above-entitled matter was presented to the consideration of the grand jury this defendant, through his counsel, went to the office of the district attorney in and for the above named district and offered to go before the grand jury and subject himself to examination and waive any privilege or immunity which might accrue to him by virtue of appearing before said grand jury as a witness in the matter in which was involved the commission of the alleged offense charged in the indictment herein.

And this the said Frank Crozier is ready to verify, wherefore he prays judgment and that by the court here he may be dismissed and discharged from the said premises in said indictment above specified.

FRANK CROZIER,
By JOHN J. HEALY,
His Attorney.

[File endorsement omitted.]

13 [Copy]

In United States District Court

[Title omitted.]

Plea of Defendant James McElvain

Filed Oct. 23, 1925

And the said James W. McElvain, in his own proper person, cometh into court here, and, having heard the indictment in the above cause read, saith that the United States of America, etc., ought not to further prosecute the said indictment against him, said James W. McElvain, because he saith that the said indictment was not found nor the information instituted within three years next after the offense charged in the indictment was committed, or within three years after any overt act charged in the indictment was committed, or within three years after the first day of April, A. D. 1921; that during all of said period from and after the commission of said alleged offense down to this date this defendant was not absent from this district, or the district in which the above offense is charged to have been committed; that this defendant has never been a fugitive from justice; that no complaint was instituted before a United States Commissioner charging this defendant with the commission of the above offense. That heretofore and prior to April 1, 1924, this defendant posted a letter in the mail, properly stamped, addressed to the collector of internal revenue at Springfield, Illinois, a copy of which letter is hereto attached, marked "Exhibit A"; that thereafter this defendant received a reply from the collector of internal revenue at Springfield, Illinois, noti-
14 ing him that he should take up the matter with the collector of internal revenue at Chicago, Illinois; that immediately upon the receipt of said reply this defendant posted a letter in the mail, properly stamped, addressed to the collector of internal revenue at Chicago, Illinois, a copy of which letter is hereto attached, marked "Exhibit B," and enclosed therein a true copy of the letter marked "Exhibit A."

This defendant further alleges that at and prior to the time when the above entitled matter was presented to the grand jury he, through his counsel, went to the office of the prosecuting attorney and offered to go before the grand jury, subject himself to examination, and waive any privilege or immunity, if any, which might accrue to him by virtue of appearing before the grand jury.

And this the said James W. McElvain is ready to verify. Wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in said indictment above specified.

(Sgd.) JAMES W. McELVAIN,
By JOHN S. LEE,
His Attorney.

15 [Copy]

Exhibit A to plea of defendant James McElvain

DECEMBER 3, 1923.

Mr. GEORGE SCHWANER,
Collector of Internal Revenue,
Springfield, Illinois.

DEAR MR. SCHWANER: Until January, 1922, I was the president and principal stockholder of the Freeman Coal Mining Company, although the management of the bookkeeping and office end of the business was in other hands. In that month certain persons represented to me that the Freeman Coal Mining Company owed the Government an additional sum of money, as I remember, on account of income earned by the company during the year 1920. Such persons agreed that if I would do certain things they would immediately cause an amended income return to be filed by the Freeman Coal Mining Company for that year and would pay the sum so alleged to be due to the Government. I did not then know and do not now know whether any such sum was due or not. Very recently facts have developed which prove to me that no such amended return was filed and no such additional payment was made, and the facts which have already come to my attention indicate to me that the whole matter was simply an effort to coerce me to do the bidding of the persons who made the representations to me with respect to such income. I wish to bring this matter to your attention first for the purpose of ascertaining finally and definitely whether anyone filed an amended income return for the Freeman Coal Mining Company for the year 1920 or paid any additional sum on account of income on behalf of said company for that year. I likewise wish to say that I have instituted a suit in connection with this matter to get possession of all the books and papers of the company, which have been taken from me, and to compel a return of my stock interests in said company, and upon getting possession of the same I intend to employ competent accountants to go over the entire matter and find out what the facts are. As soon as I have ascertained the situation I will immediately notify you, and if for that year there is any income which has not been properly returned to the Government I propose to see that the income is accounted for and the payment made. In the meantime I suggest that an audit of the books of this company be immediately made to ascertain definitely whether an additional sum is due to the Government.

Will you not kindly let me know whether an amended income return has heretofore been filed?

Yours very sincerely,

JAMES W. McELVAIN.

16 [Copy]

Exhibit B to plea of defendant James McElvain

DECEMBER 21, 1923.

COLLECTOR OF INTERNAL REVENUE,
Chicago, Illinois.

DEAR SIR: I beg to enclose to you herewith copy of a letter which I wrote on December 3rd to Mr. George Schwaner, collector of internal revenue, at Springfield, Illinois. In accordance with his suggestion I am sending you the correspondence.

Confirming my letter of December 3rd, I wish to say that I have instituted a suit in connection with this matter to get possession of all the books and papers of the Freeman Coal Mining Company, which have been taken from me, and to compel a return of my stock interests in said company, and upon getting possession of the same I intend to employ competent accountants to go over the entire matter and find out what the facts are. As soon as I have ascertained the situation I will immediately notify you, and if for that year there is any income which has not been properly returned to the Government, I propose to see that the income is accounted for and the payment made. In the meantime I again suggest that an audit of the books of this company be immediately made to ascertain definitely whether an additional sum is due to the Government.

Will you not kindly let me know whether an amended income tax return has heretofore been filed in your office here in Chicago.

Yours very truly,

JAMES W. McELVAIN.

[File endorsement omitted.]

17 [Minute entry of argument and submission, Nov. 3, 1925, omitted in printing.]

18 In United States District Court

[Title omitted.]

Demurrer to plea of defendant James W. McElvain

Filed Dec. 16, 1925

And now comes the United States of America, by Edwin A. Olson, United States attorney, and says that the said plea of the defendant James W. McElvain, filed in this court on the 23d day of October, A. D. 1925, is not sufficient in law to require the said United States of America to reply thereto, and this he is ready to verify, wherefore it prays judgment, etc.

UNITED STATES OF AMERICA,
By EDWIN A. OLSON,
United States Attorney.

[File endorsement omitted.]

19 In United States District Court

[Title omitted.]

Demurrer to plea of defendant Frank Crozier

Filed Dec. 16, 1925

And now comes the United States of America, by Edwin A. Olson, United States attorney, and says that the said plea of the defendant Frank Crozier, filed in this court on the 23d day of October, A. D. 1925, is not sufficient in law to require the said United States of America to reply thereto, and this he is ready to verify, wherefore it prays judgment, etc.

UNITED STATES OF AMERICA,
By EDWIN A. OLSON,
United States Attorney.

[File endorsement omitted.]

20 In United States District Court

[Title omitted.]

Judgment

Dec. 16, 1925

This cause coming on to be heard upon the indictment heretofore returned herein by the grand jury against the defendants, James W. McElvain, Carley H. Hoy, and Frank Crozier; the separate pleas in bar heretofore filed herein by the defendants, James W. McElvain and Frank Crozier, and upon the demurrer of the United States of America to each of said several pleas, and the respective parties hereto being now before the court, and the court having heard the arguments of counsel for the several parties, and being fully advised in the premises, doth order that the demurrer of the United States of America to the said several pleas of the defendants, James W. McElvain and Frank Crozier, be and the same are hereby overruled, and the United States of America now refusing to further plead herein, it is hereby ordered, adjudged, and decreed that the several pleas of the defendants, James W. McElvain and Frank Crozier, be and the same are hereby sustained, and said defendants, James W. McElvain and Frank Crozier, be and they are each of them hereby dismissed and discharged from the said premises in said indictment specified.

Enter.

JAMES H. WILKERSON, *Judge.*

21 In United States District Court

[Title omitted.]

Judge's certificate

Filed Dec. 16, 1925

This is to certify that in entering the order on the 16th day of December, A. D. 1925, in the above-entitled cause, overruling the demurrers filed by the United States of America to the pleas in abatement filed by James W. McElvain and Frank Crozier, defendants in the above-entitled cause, and in dismissing the proceedings, I was of the opinion that at the time the indictment in this cause was returned into court, to wit, October 3, 1924, the offense as alleged in said indictment was barred by the statute of limitations.

No question of an interpretation of the indictment was involved in my decision.

JAMES H. WILKERSON,
Judge of the United States District Court for the Northern District of Illinois, Eastern Division.

[File endorsement omitted.]

22 In United States District Court

[Title omitted.]

Order allowing writ of error

Dec. 16, 1925

Comes Edwin A. Olson, Esq., United States attorney, and on his own motion it is hereby ordered that petition for writ of error be filed and a writ of error and citation be allowed and to issue.

23 In United States District Court

[Title omitted.]

Petition for writ of error

Filed Dec. 16, 1925

To the honorable JAMES H. WILKERSON,
Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division.

Your petitioner, the United States of America, by Edwin A. Olson, United States attorney for the Northern District of Illinois, eastern division thereof, respectfully represents that on the 16th day of December, A. D. 1925, at the regular November term, A. D. 1925, of

said District Court of the United States for the Northern District of Illinois, eastern division thereof, a final decision or judgment was entered in said court sustaining the pleas in abatement of the defendants, James W. McElvain and Frank Crozier, filed to an indictment, which the grand jurors of the United States for said division and district empaneled and sworn in said District Court of the United States for said division and district, had returned as a true bill against the said James W. McElvain and the said Frank Crozier, for a violation of section 37 of the Criminal Code of the United States.

Your petitioner further represents that the said decision or judgment sustaining said pleas in abatement is based upon a construction of the statute of limitations upon which the said pleas in
24 abatement are founded, to wit, section 1044 of the Revised Statutes of the United States, as amended, Nov. 17, 1921.

Your petitioner further represents that, as he is advised, this court erred in construing said section 1044, Revised Statutes of the United States, as amended November 17, 1921, and erred in sustaining said please in abatement because of said construction.

Your petitioner further shows that the act of March 2, 1907, chapter 2564, 34 Statutes at Large, 1246, provides that:

"A writ of error may be taken by and on behalf of the United States from the District or Circuit Court direct to the Supreme Court of the United States, in all criminal cases, and in the following instances, to wit, from a decision or judgment quashing, setting aside, or sustaining a demurrer to any indictment, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded."

* * * * * * *

"From the decision or judgment sustaining a special plea in bar when the defendant has not been put in jeopardy."

Wherefore your petitioner respectfully prays that a writ of error may be granted by the honorable court to your petitioner, authorizing and directing the presentation of the record herein direct to the Supreme Court of the United States, as by law provided, and that the clerk of this court be authorized and directed to certify said record to the Supreme Court of the United States, as by law provided, to the end that the errors complained of, if any have occurred, may be duly corrected and full and speedy justice done in the premises.

EDWIN A. OLSON,
United States Attorney for the
Northern District of Illinois, Eastern Division Thereof,
Attorney for Plaintiff.

Dated: Chicago, Illinois, December 16th, A. D. 1925.

[File endorsement omitted.]

25 In United States District Court

[Title omitted.]

Assignments of error

Filed Dec. 16, 1925

Now comes the United States of America, by Edwin A. Olson, United States attorney for the Northern District of Illinois, and says that in the aforesaid proceedings and in the decision and judgment of said court sustaining the pleas in abatement of the defendants, James W. McElvain and Frank Crozier, to the indictment herein, there is manifest error in this, to wit:

1. The District Court erred in sustaining the pleas in abatement filed by James W. McElvain and Frank Crozier to the indictment.

2. The District Court erred in construing the statute of limitations, to wit, section 1044, Revised Statutes of the United States, as amended November 17, 1921.

3. The District Court erred in rendering judgment in favor of the defendants and against the plaintiff, based upon the construction of the statute of limitations, to wit, section 1044, Revised Statutes of the United States, as amended November 17, 1921.

26 4. The District Court erred in entering judgment in favor of the defendants and against the plaintiff.

5. The District Court erred in sustaining the pleas in abatement of the defendants, James W. McElvain and Frank Crozier, and in dismissing, vacating, and setting aside the indictment, based upon a construction of the statute of limitations, to wit, section 1044, Revised Statutes of the United States, as amended November 17, 1921, and in holding that said statute was a bar to the prosecution as to the matters set forth in the indictment.

Wherefore the said United States of America, plaintiff, prays that the aforesaid judgment may be reversed.

EDWIN A. OLSON,
United States Attorney for the
Northern District of Illinois, Eastern Division Thereof,
Attorney for Plaintiff.

Dated this 16th day of December, A. D. 1925.

[File endorsement omitted.]

27 In United States District Court

Writ of error

Filed Dec. 16, 1925

UNITED STATES OF AMERICA, SS:

The President of the United States, to the Honorable the Judges of the District Court of the United States for the Northern District of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said District Court before you, or some of you, between the United States of America, plaintiff, and James W. McElvain and Frank Crozier, defendants, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable William Howard Taft, Chief Justice of the United States, the 16 day of December, in the year of our Lord nineteen hundred twenty-five.

[SEAL.] CHARLES M. BATES,
Clerk of the District Court of the United States for the Northern District of Illinois.

Allowed by:

JAMES H. WILKERSON,
Judge of the District Court of the United States, Northern District of Illinois, Eastern Division.

Dated Chicago, Illinois, this 16th day of December, A. D. 1925.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

In obedience to the within writ I herewith transmit to the United States Supreme Court a true and complete transcript of the record and proceedings in the foregoing-entitled cause this 31st day of December, A. D. 1925.

[SEAL.] CHARLES M. BATES,
Clerk United States District Court, Northern District of Illinois.

28 [Citation in usual form showing service on John J. Healey, filed Dec. 16, 1925; omitted in printing.]

29 [Citation in usual form showing service on John H. S. Lee, filed Dec. 16, 1925; omitted in printing.]

30 In United States District Court

[Title omitted.]

Order granting leave to file stipulation and exhibits

Dec. 22, 1925

On motion and stipulation of the respective parties hereto, leave is hereby given to file the stipulation and exhibits attached thereto, being certain portions of the Congressional Record referred to in said stipulation in the above-entitled cause; and it is ordered that the said stipulation and exhibits be included in the transcript of the record filed in said cause.

JAMES H. WILKERSON, *Judge.*

31 In United States District Court

[Title omitted.]

Stipulation re exhibits

Filed Dec. 22, 1925

On the hearing of the demurrer of the United States of America to the pleas of the statute of limitations respectively filed by the defendants, Frank Crozier and James W. McElvain, the following evidence was offered on behalf of the defendants in support of such pleas and was heard and considered by his honor, Judge Wilkerson, by and with the consent of the United States of America, and by the stipulation of the parties was and is made a part of the record in said cause:

Part of the Congressional Record of October 31, 1921, beginning with the words:

"Limitations in criminal cases

"Mr. VOLSTEAD. Mr. Speaker, I call up the bill H. R. 8298, to amend section 1044 of the Revised Statutes of the United States relating to limitations in criminal cases, which I send to the desk and ask to have read."

on temporary page 7861, and ending with the words:

"On motion of Mr. Volstead, a motion to reconsider the vote by which the bill (H. R. 8298) was passed was laid on the table."

on temporary page 7864, marked "Exhibit A" and attached hereto. Also House of Representatives Report Number 365, 67th Congress, first session, entitled "Amendment to section 1044, Revised Statutes," marked "Exhibit B" and attached hereto. Also part of
32 Congressional Record of November 14, 1921, temporary page 8535, beginning with the words:

"Limitations in criminal cases

"Mr. NELSON. From the Committee on the Judiciary I report back favorably without amendment the bill (H. R. 8298) to amend section 1044 of the Revised Statutes of the United States relating to limitations in criminal cases."
and ending with the words:
"The PRESIDING OFFICER. Without objection, Senate bill 2410, Order of Business 288, to amend section 1044 of the Revised Statutes, United States, relating to limitations in criminal cases, will be taken from the calendar and indefinitely postponed."
on temporary page 8536; a copy of the portion of the Congressional Record so indicated is hereto attached and marked "Exhibit C." Also a portion of Senate Report Number 275, 67th Congress, first session on internal-revenue bill of 1921, page 32, as follows:
"Section 1321 amends the act which prescribes limitations upon prosecutions of misdemeanor in internal-revenue cases, and extends the period from two to three years."

EDWIN A. OLSON,
Attorney for the United States of America.
JOHN J. HEALY,
Attorney for Frank Crozier, Defendant.
JOHN H. S. LEE,
Attorney for James W. McElvain, Defendant.

[File endorsement omitted.]

33 [Clerk's certificate to foregoing transcript omitted in printing.]

34–35 [Stipulation re exhibits omitted; printed side page 31 ante.]

Exhibit "A" to stipulations re exhibits

[Congressional Record, October 31, 1921, pp. 7861-7864]

36 LIMITATIONS IN CRIMINAL CASES

Mr. VOLSTEAD. Mr. Speaker, I call up the bill H. R. 8298, to amend section 1044 of the Revised Statutes of the United States relating to limitations in criminal cases, which I send to the desk and ask to have read.
The Clerk read as follows:
"Be it enacted, etc., That section 1044 of the Revised Statutes of the United States be amended so as to read as follows:

"SEC. 1044. No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 1046, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed: Provided, however, That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years, and shall not begin to run until the fraudulent transactions are known to the Government. This act shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but this proviso shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws."

"SEC. 2. That this act shall be in force and effect from and after the date of its passage."

With the following committee amendment:

"Page 2, line 2, after the word 'years,' strike out the comma and the language 'and shall not begin to run until the fraudulent transactions are known to the Government. This act shall apply to acts, offenses, or transactions, where the existing statute of limitations has not yet fully run, but this proviso shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws.'"

Mr. VOLSTEAD. Mr. Speaker, I yield 10 minutes to the gentleman from Illinois [Mr. Graham].

Mr. GRAHAM of Illinois. Mr. Speaker and gentlemen of the House, shortly after the present Congress was convened I called the attention of the Attorney General to the fact that the statute of limitations was running on almost every kind of crime that had been committed, or that could be charged as having been committed, during the war. Section 1044 of the Criminal Code provides a period of limitation of three years on almost all offenses against the Government, such as might have been committed at any time during or since the war. As the war ended on the 11th of November, 1918, it will be seen that a great many of these crimes are already barred by the statute of limitations, the bar having been complete on the 11th of November, 1921, as to all crimes committed during the war period. As to all such crimes, no prosecution can now be had. However, in the period following the war, and in the things that grew out of the war, crimes were committed which are not yet barred, and it has been thought useful, inasmuch as the Attorney General is now investigating many of these matters, that the statute should be so extended that if there has been crime, the Department of Justice may prosecute.

This simply extends the limitation as to crimes against the United States for three years, so that from now on the limitation on crimes committed against the United States such as are defined in this act will be six years instead of three. It extends to no other kinds of crime. Those crimes are described in the proviso as "offenses in-

volving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes," so that it will be seen that this bill deals with fraud largely.

Mr. FESS. Mr. Speaker, will the gentleman yield?

Mr. GRAHAM of Illinois. Yes.

Mr. FESS. Do I understand that the three years is from the time the alleged crime takes place?

Mr. GRAHAM of Illinois. Yes.

Mr. FESS. Unless we do pass this, there will be no prosecution under the limitation of the statute after a very short time, no matter what might be divulged.

Mr. GRAHAM of Illinois. That is true. You can date back now three years in your mind from this date and anything that happened before that is already barred, and the six-year limit will only run on such crimes as are not now barred by any such limit of three years. I think I need not discuss this with lawyers, but the propositions are well borne out by the authorities, and with the consent of the House I shall incorporate a short brief with my remarks. If the crime has been barred by the existing statute of limitations no prosecution can thereafter be had for that crime. To pass an act which would be retroactive in its operation after the period of limitation has once run has been held to contravene the spirit of the Constitution providing against ex post facto laws. But where the period of limitations has not run, then the legislative body can extend it to any limit it desires, because it has been held by the United States Supreme Court and most of the higher courts of the States of the Union that a limitation on a crime was simply an act of grace extended by the sovereign to the individuals, and until the time when prosecution was ended by the lapsing of this time he could claim no rights under an existing statute.

Mr. RAKER. Mr. Speaker, will the gentleman yield?

Mr. GRAHAM of Illinois. Yes.

Mr. RAKER. I see the bill as the gentleman introduced it contains provisions in lines 3 to 8 inclusive, on page 2. The first provision I shall pass for the moment, but does not the gentleman think that the second provision, that the act shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, should remain in this act?

Mr. GRAHAM of Illinois. I do. Let me make a short explanation. When I went before the committee with the representative of the Department of Justice, in looking over this act we concluded, all of us, that the first proposition—

"and shall not begin to run until the fraudulent transactions are known to the Government"—

was manifestly wrong and ought to go out, and the committee all agreed to that. Then the next clause to which the gentleman refers was thought by the committee to be the law now, and they struck it out, but since then I have conversed with the Attorney

General and some of the members of the committee, and it is now the impression of the chairman of the committee and such members as I have talked to, and it is my own opinion, that that language ought to remain in the bill.

Mr. RAKER. In the State courts and in the Federal courts that provision and the two fundamental principles it announces there has caused a great deal of litigation. If the committee leaves this in the act, then there will be a legislative declaration as well as a court declaration, and it will avoid further complications.

Mr. GRAHAM of Illinois. And there is another thing the gentleman will readily see. If it were in the original bill and was stricken out by amendment, some courts might think it was our intention to do something else.

Mr. RAKER. That was in my mind, whether the courts might not take it for granted that Congress tried to change this policy that had been adopted by the courts.

Mr. GRAHAM of Illinois. I agree with the gentleman, and I have no doubt that the amendment, which should be offered by the gentleman from Minnesota, should extend only to the language in lines 3 and 4, ending with the word "Government."

Mr. RAKER. And to leave in the bill the provisions contained in lines 4, 5, 6, 7, and 8, beginning with the language "this act" and ending with the word "laws."

Mr. GRAHAM of Illinois. Yes.

Mr. TILSON. Mr. Speaker, will the gentleman yield?

Mr. GRAHAM of Illinois. Yes.

Mr. TILSON. If I understand the gentleman correctly, if there were any great frauds committed against the Government during the war period, this would practically leave them out; they will have been already barred before this bill becomes effective.

Mr. GRAHAM of Illinois. It is an unfortunate fact that many of the crimes that were committed during the war are barred, and were barred last fall. Many of them were barred a couple of years ago.

That is, crimes that may have been committed since April 6, 1917, only three years elapsed for their prosecution and punishment, and practically all of them are outlawed. Many of the frauds which were committed in the closing up of war contracts occurred after the end of the war and may yet be prosecuted by the Department of Justice.

Mr. TILSON. If the crime happened earlier than that——

Mr. GRAHAM of Illinois. They are out.

Mr. TILSON. They are out. Suppose the Shipping Board, or any other large enterprise of the war, may find there has been a gross offense against the Government, there will be no remedy?

Mr. GRAHAM of Illinois. It is too late. During the period of the war, we will say, somebody made a fraudulent contract and robbed the Government of millions of dollars. I want to say to the gentleman, frankly, he can not be prosecuted. The statute of limitations

will run against them and they are out. There are some few that can be reached by this, and in order to give the Department of Justice a little bit of a show to reach some of them that perhaps could be reached we desire to pass this legislation and give them a chance. As a matter of fact, I want to call attention to this fact: The this statute of limitations. Nobody apparently paid any attention late Senator Mason during his lifetime introduced a bill to extend to it. It never got any consideration, I believe; at any rate, it did not pass, and if the bill Mr. Mason introduced had passed most of the people who possibly did commit fraud during the war might yet be prosecuted. However, as I say, it did not pass. It was lost in the shuffle. So we considered the best thing we could do was to pass this legislation. Incidentally, Mr. Speaker, I have a letter in my hand from the Attorney General to Mr. Volstead, which he has handed me, approving of this bill and asking for its passage.

Mr. NEWTON of Minnesota. Will the gentleman yield?

Mr. GRAHAM of Illinois. Yes.

Mr. NEWTON of Minnesota. The gentleman understands that it is not possible for us to provide that in the case of offenses to which the statute of limitations did apply that the statute of limitations can in any way be revived?

Mr. GRAHAM of Illinois. It can not be revived under any possibility. The Supreme Court of the United States has held point blank on that matter. I will set out those decisions in my remarks.

The SPEAKER pro tempore. The time of the gentleman has expired.

Mr. HILL. Mr. Speaker, I ask unanimous consent that the time of the gentleman be extended.

Mr. GRAHAM of Illinois. Cr. Speaker, I ask unanimous consent to extend my remarks by including the brief to which I alluded and the letter of the Attorney General of which I spoke.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Illinois to include the matter to which he referred? [After a pause.] The Chair hears none.

Mr. GRAHAM of Illinois. Under the leave to extend my remarks the following brief and letter of the Attorney General are now here inserted in the Record:

Brief

The question here presented for consideration relates to the powers of Congress to make laws extending the statute of limitations.

First. Can Congress enact a law extending existing statutes of limitations so as to revive cases in which the statutory period has already run; and

Second. Can the period be extended in cases where the statutory period has not yet run?

I. As to the first question, the weight of authority, so far as case law is concerned, seems to be that if the statutory period of the statute has fully run and the bar has once attached so that the defendant could not be prosecuted under the existing statute the law

can not be changed by legislation so as to extend the period of limitation. (See Wood, Limitation of Actions, vol. 1, p. 78.)

The leading case on this subject is Moore *v.* State. (43 N. J. L., 203), the syllabus of which is as follows:

"A statute which purports to authorize the prosecution, trial, and punishment of a person for an offense previously committed, and as to which all prosecution, trial, and punishment were at its passage already barred according to preexisting statutes of limitation is unconstitutional and void."

The reasoning of this case seems to rest upon the doctrine that the defendant in such criminal proceedings has acquired a vested right not to be prosecuted or punished for his offense, and that the legislature does not possess the power to take the right away. Reasoning further, the court says that—

"Where there is a legal right there is also a legal remedy by suit or action at law it follows that where the remedy by action is 37-39 tolled the right also is legally extinguished so far as that remedy was necessary for its enforcement."

The following cases cited, in the leading case, hold that the legislature does not have the power by the extension of the statute to revive the right to prosecute:

"Naught *v.* O'Neal (1 Ill., 36); Sprecker *v.* Wakeley (11 Wis., 432); Parish *v.* Eager (15 Wis., 532); Bagg's appeal (43 Pa., 512); McKinney *v.* Springer (8 Blackf., 506); Stipp *v.* Brown (2 Ind., 647); Davis *v.* Minor (1 How., Miss., 183); Woodman *v.* Fulton (47 Miss., 682); Martin *v.* Martin (35 Ala., 560); Girdner *v.* Stephens (1 Heisk., 280); Atkinson *v.* Dunlay (50 Me., 111); Ryder *v.* Wilson's Express (12 Vroom, 9).

The leading case here not only maintains that the prospective defendant has acquired a vested right to be free from such prosecution but that such an enactment is an ex post facto law. This case also likens the bar which the statute sets up to an amnesty and reasons that while it may be an act of grace on the part of the sovereign power to grant a pardon or an amnesty, that having once granted an amnesty or pardon the status of those amnestied or pardoned has been fixed and can not be changed by subsequent act of legislation. Wharton, Criminal Pleading and Practice, section 316, says that—

"An act of Congress which undertakes to authorize prosecutions for offenses which prior statutes of limitation have canceled is an ex post facto law, and hence void."

The State *v.* Sneed (25 Tex., 66) is another case cited approvingly in the leading case and others and holds the same view. In this case the bar of the statute of limitations was completed before the code went into effect, which limited prosecutions in certain cases to two years. The syllabus of this case is as follows:

"Where an offense under the statute was barred by limitations at the time the code went into effect the extension by the latter of the time necessary to bar the offense will not revive the right of action

in the State, and a prosecution of the same can not be maintained. (Penal Code, art. 186; Paschal's Digest, art. 2653, note 706.)

"The legislature can not have intended to give an ex post facto operation to the code."

In Kring *v.* Missouri (107 U. S., 250), in a dissenting opinion by Mr. Justice Matthews, with whom concurred Mr. Chief Justice Waite, Mr. Justice Bradley, and Mr. Justice Gray, the following language, which seems to summarize the law on the subject, is used:

"And while it would be a violation of the constitutional maxim which forbids retrospective legislation inconsistent with vested rights to deprive, by a repeal of statutes of limitation, a defendant of a defense which had become perfect while they were in force, yet if, before the bar had become complete, he should be deprived of an expected defense by an extension of time in which suit might be brought he would have no just cause to object that he was compelled to meet the case of his adversary upon its merits."

II. As to the second question above, the general rule seems to be that where the statute of limitations has not fully run and where the defendant is still liable to prosecution the legislature may extend the period of limitation and such law does not violate the ex post facto law of the Constitution or any other right of the defendant. The reasoning of all the cases seems to proceed upon the theory that the defendant has no vested right, or any other right, that he may set up against such statutes. On this point the leading case of Moore *v.* State, cited above, says that—

"Until the fixed period has arrived, the statute is a mere regulation of the remedy, and, like other such regulations, subject to legislative control; but afterwards it is a defense, not of grace but of right; not contingent but absolute and vested; and, like other such defenses, not to be taken away by legislative enactment."

The leading case on this branch of the subject is Commonwealth *v.* Duffy (96 Pa. State, 507). This is a case in which the validity of a statute of limitations barring prosecutions for forgery to two years was extended to five years. In this case the law was passed before the statutory bar had attached. The third and fourth points of the syllabus are as follows:

"An act of limitation is an act of grace purely on the part of the legislature, and especially is this the case in the matter of criminal prosecutions. The State makes no contract with criminals, at the time of the passage of an act of limitations, that they shall have immunity from punishment if not prosecuted within the statutory period. Such enactments are measures of public policy only. They are entirely subject to the mere will of the legislative power, and may be changed or repealed altogether, as that power may see fit to declare.

"When a right to acquittal has not been absolutely acquired by the completion of the period of limitation, that period is subject to enlargement or repeal without being obnoxious to the constitutional prohibition against ex post facto laws."

Kring *v.* Missouri and other cases, cited above, bear on this same point.

III. A third position is taken by Bishop, in his Statutory Crimes, sections 265, 266, and 267. He denies that the doctrine of vested rights applies to this case, but says that it is a doctrine of property law only, maintaining that—

"there is no such thing as a right vested in one to go unwhipped of criminal justice."

He denies that the ex post facto provision of State or Federal Constitution applies to this case. Hence, he maintains that Congress or a legislature has plenary power to alter, amend, or change a statute of limitations by an extension of time so that it may cover prosecutions for crime under both clauses of cases above. It may be said in passing that he does not cite any cases to sustain his position.

OFFICE OF THE ATTORNEY GENERAL,
Washington, D. C., August 13, 1921.

Hon. A. J. VOLSTEAD,
Member of Congress, Washington, D. C.

MY DEAR MR. VOLSTEAD: I inclose form of bill, about which I talked to you, to amend section 1044 of the Revised Statutes of the United States relating to limitations in criminal cases. As I told you, there are many cases growing out of the war upon which the statute of limitations may soon run, placing the Government to a disadvantage unless there is some relief such as is proposed in the inclosed bill. We are undertaking to investigate many transactions with the Government during and growing out of the war and I am convinced of the propriety of this legislation. I am asking Senator New, with whom I have talked, to introduce a similar bill in the Senate, and I wish you would confer with Senator New and act together so that this measure may be introduced and put through as expeditiously as possible.

I also inclose a memorandum we have prepared in connection with the bill, which may be of service to you. If there is any other information you desire on the subject I shall be glad to confer with you.

Very truly, yours,

H. M. DAUGHERTY, *Attorney General.*

Mr. VOLSTEAD. Mr. Speaker, I would like to know if there is anyone opposed to this bill? If not, I ask for a vote.

The SPEAKER pro tempore. The question is on the committee amendment.

Mr. STAFFORD. Mr. Speaker, I ask for a division on the amendment.

Mr. VOLSTEAD. I desire to offer a substitute for the committee amendment.

Mr. STAFFORD. If the gentleman desires to offer a substitute I withdraw my demand for a division.

The SPEAKER pro tempore. The gentleman from Minnesota offers an amendment which the Clerk will report.

Mr. VOLSTEAD. Strike out line 3, page 2, and the first five words in line 4, down to the period, and insert a period at the end of line 2, on page 2.

The SPEAKER pro tempore. The Clerk will report the amendment.

The Clerk read as follows:

"Amendment offered by Mr. Volstead: Page 2, line 2, after the word 'years,' strike out the comma and insert a period. Strike out all of lines 3 and 4 down to and including the period after the word 'government.'"

Mr. RAKER. Mr. Speaker, I want recognition.

The SPEAKER pro tempore. Does the gentleman from Minnesota desire recognition?

Mr. VOLSTEAD. I desire to make that change because I think the words in lines 3 and 4, which I desire to strike out, ought to go out, and I think the rest of the paragraph ought to remain in. I ask for a vote on that.

Mr. RAKER. Mr. Speaker, I ask to be recognized.

Mr. HILL. Mr. Speaker, I move to strike out the last word.

Mr. VOLSTEAD. I move the previous question on the amendment.

The SPEAKER pro tempore. The Chair has recognized the gentleman from Maryland to strike out the last word.

Mr. HILL. I ask for recognition to ask the chairman of the committee in my time if six years is considered long enough on some of these contracts?

Mr. VOLSTEAD. I think so.

Mr. HILL. The committee has been over that fully?

Mr. VOLSTEAD. That is the suggestion of the Attorney General, six years.

Mr. HILL. Does not the chairman of the committee think 10 years would be better?

Mr. VOLSTEAD. No; I think six is enough. I move the previous question on the amendment.

The SPEAKER pro tempore. The gentleman from Minnesota moves the previous question on the amendment and the amendment thereto.

The previous question was ordered.

The SPEAKER pro tempore. The question is on the substitute offered by the gentleman from Minnesota [Mr. Volstead].

The amendment by way of substitute was agreed to.

The SPEAKER pro tempore. The question now is on the amendment as amended.

The amendment as amended was agreed to.

Mr. VOLSTEAD. Mr. Speaker, I now move the previous question on the bill to final passage.

The previous question was ordered.

The SPEAKER pro tempore. The question is on the engrossment and third reading of the bill.

Mr. ROSENBLOOM. Mr. Speaker, I make the point of order there is no quorum present.

The SPEAKER pro tempore. Evidently there is no quorum present.

Mr. LONGWORTH. Mr. Speaker, I move a call of the House.

The motion was agreed to.

The SPEAKER pro tempore. The Doorkeeper will close the doors and the Sergeant at Arms will notify the absentees, and the Clerk will call the roll.

The roll was called, and the following Members failed to answer to their names:

[Roll No. 159]

Ansorge	Freeman	Kreider	Riddick
Bacharach	French	Kunz	Riordan
Barkley	Fuller	Langley	Robertson
Beedy	Funk	Lee, Ga.	Robsion
Bixler	Gahn	Lee, N. Y.	Rodenberg
Bland, Ind.	Gallivan	Lineberger	Rose
Bland, Va.	Garner	Linthicum	Rossdale
Bond	Garrett, Tex.	McCormick	Rucker
Bowers	Gilbert	McKenzie	Ryan
Brand	Goldsborough	McLaughlin, Pa.	Sabath
Brooks, Pa.	Goodykoontz	Maloney	Sanders, Ind.
Brown, Tenn.	Gould	Mann	Sanders, N. Y.
Burdick	Graham, Pa.	Mansfield	Siegel
Burtness	Green, Iowa	Martin	Sinclair
Cantril	Greene, Vt.	Mead	Slemp
Carew	Griest	Michaelson	Snell
Carter	Griffin	Mills	Snyder
Chandler, N. Y.	Hays	Moore, Ill.	Stiness
Chandler, Okla.	Herrick	Moore, Va.	Strong, Pa.
Classon	Hicks	Mott	Sullivan
Connell	Himes	Mudd	Summers, Tex.
Connolly, Pa.	Hogan	Murphy	Swing
Cooper, Ohio	Houghton	Nelson, J. M.	Taylor, Colo.
Copley	Hukriede	Nolan	Taylor, N. J.
Crago	Hull	O'Brien	Thomas
Cullen	Hutchinson	Ogden	Tillman
Dale	Jefferis, Nebr.	Oliver	Tincher
Deal	Jeffers, Ala.	Overstreet	Valle
Dempsey	Johnson, S. Dak.	Paige	Vare
Drewry	Jones, Pa.	Parker, N. Y.	Vestal
Dunbar	Kahn	Patterson, Mo.	Volk
Dunn	Kendall	Perkins	Walters
Edmonds	Kennedy	Perlman	Ward, N. C.
Elston	Kiess	Peters	Wason
Fairfield	Kincheloe	Petersen	Watson
Fenn	Kindred	Purnell	White, Kans.
Fields	King	Radcliffe	White, Me.
Fish	Kirkpatrick	Rainey, Ala.	Williams
Flood	Kitchin	Rainey, Ill.	Winslow
Focht	Kleczka	Reavis	Wise
Fordney	Kline, N. Y.	Reber	Wood, Ind.
Frear	Knight	Reece	Young

40 *Exhibit B to stipulation re exhibits*

[House of Representatives, 67th Congress, 1st session. Report No. 365]

AMENDMENT TO SECTION 1044, REVISED STATUTES

August 22, 1921.—Referred to the House Calendar and ordered to be printed.

Mr. Volstead, from the Committee on the Judiciary, submitted the following report (to accompany H. R. 8298):

The Committee on the Judiciary, to whom was referred the bill (H. R. 8298) to amend section 1044 of the Revised Statutes, having considered the same, reports thereon with the recommendation that the same be amended and as so amended do pass.

The amendments so proposed are as follows:

First. Change the comma at the end of line 13 to a period, and strike out all of line 14 on page 1 and up to and including the period after the word "Government" in line 1, on page 2.

Second. Strike out lines 2, 3, and 4 on page 2, and that part of line 1 after the period on the same page.

Section 1044 of the Revised Statutes is as follows:

"No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section one thousand and forty-six, unless the indictment is found, or the information is instituted within three years next after such offense shall have been committed. But this act shall not have effect to authorize the prosecution, trial, or punishment for any offense barred by the provisions of existing laws."

The Department of Justice has been engaged in the investigation and is now engaged in the investigation of various alleged offenses, consisting largely of frauds againt the Government which are claimed to have occurred during the war with Germany and since its conclusion. Many of these alleged offenses grew out of the contractural relation of the Government with various persons and corporations engaged in the furnishing of military and naval supplies of various kinds. Many of these transactions require the most minute investigation in order to ascertain the exact facts, and in every case a considerable period must elapse before such facts may be gathered from the files and other sources that the department may know whether prosecutions are justified or not. In many cases months, and perhaps considerable longer periods, will be required for such investigations.

Under the existing statute of limitations, above quoted, many of these alleged crimes are already barred, and in all such cases under the law no prosecutions can be had if any might be thought advisable. However, as to a very large and considerable number of cases, if prosecutions might be found necessary, the same could be had if the existing statute were extended so that the Government might have the opportunity, not only to make an investigation, but thereafter to begin the necessary prosecutions.

There is no legal question as to the right of the Congress to thus extend the period of the statute. On this question Hon. James M. Beck, Solicitor General of the Department of Justice, has submitted the following suggestions to the committee which are herewith made part of this report, as follows:

"As to the second question above, the general rule seems to be that where the statute of limitations has not fully run, and where the defendant is still liable to prosecution, the legislature may extend the period of limitation and such law does not violate the ex post facto law of the Constitution or any other right of the defendant. The reasoning of all the cases seems to proceed upon the theory that the defendant has no vested right, or any other right, that he may set up against such statutes. On this point, the leading case of Moore *v.* State, cited above, says that—

"'Until the fixed period has arrived, the statute is a mere regulation of the remedy, and, like other such regulations, subject to legislative control; but afterwards, it is a defense, not of grace, but of right; not contingent, but absolute and vested; and, like other such defenses, not to be taken away by legislative enactment.'

"The leading case on this branch of the subject is Commonwealth *v.* Duffy (96 Pa. Stats., 507). This is a case in which the validity of a statute of limitations barring prosecutions for forgery to two years was extended to five years. In this case the law was passed before the statutory bar had attached. The third and fourth points of the syllabus are as follows:

"'An act of limitation is an act of grace purely on the part of the legislature, and especially is this the case in the matter of criminal prosecution. The State makes no contract with criminals, at the time of the passage of an act of limitations, that they shall have immunity from punishment if not prosecuted within the statutory period. Such enactments are measures of public policy only. They are entirely subject to the mere will of the legislative power, and may be changed or repealed altogether as that power may see fit to declare.

"'When a right to acquittal has not been absolutely acquired by the completion of the period of limitation, that period is subject to enlargement or repeal without being obnoxious to the constitutional prohibition against ex post facto laws.'

"Kring *v.* Missouri and other cases, cited above, bear on this same point.

"A third position is taken by Bishop, in his Statutory Crimes, sections 265, 266, and 267. He denies that the doctrine of vested rights applies to this case, but says that it is a doctrine of property law only, maintaining that 'there is no such thing as a right vested in one to go unwhipped of criminal justice.'

"He denies that the ex post facto provision of State or Federal Constitution applies to this case. Hence, he maintains that Congress or a legislature has plenary power to alter, amend, or change a statute of limitations by an extension of time so that it may cover

prosecutions for crime under both clauses of cases above. It may be said in passing that he does not cite any cases to sustain his position.

"In drafting statutes on the above subject, care should be taken that the amendatory statute should be clearly made to apply to offenses already committed, for, in the absence of such clear intendment, there is a tendency on the part of the courts to hold that the amendatory statutes are prospective and that it was not the legislative intent to make them apply to crimes already committed."

In view of the very considerable period that has elapsed since the declaration of war, the necessity for an early passage of this act is obvious.

41–42 *Exhibit C to stipulation reexhibits*

[Congressional Record, November 14, 1921, pp. 8535, 8536]

LIMITATIONS IN CRIMINAL CASES

Mr. NELSON. From the Committee on the Judiciary I report back favorably without amendment the bill (H. R. 8298) to amend section 1044 of the Revised Statutes of the United States relating to limitations in criminal cases.

I ask unanimous consent for the present consideration of the bill, as it is a matter of great urgency. With the permission of the Senate, I will briefly state its purpose.

It is a bill the passage of which is recommended by the Department of Justice. The present statute of limitations in criminal cases is three years. This bill proposes to amend it so that in the case of offenses involving the defrauding or attempting to defraud the United States, or any agency thereof, the time shall be six years. It is extended to six years, but it does not apply to cases where the statute of limitations has already run. There is nothing ex post facto about it. It is a case of great urgency, and I trust that the bill may receive immediate consideration.

The VICE PRESIDENT. Is there objection to the immediate consideration of the bill?

Mr. KING. Reserving the right to object, I ask that the bill may be read.

The VICE PRESIDENT. The bill will be read.

The Assistant Secretary read the bill, as follows:

"Be it enacted, etc., That section 1044 of the Revised Statutes of the United States be amended so as to read as follows:

"'SEC. 1044. No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 1046, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed: Provided, however, That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years. This act shall apply to acts, offenses, or transactions where the existing statute

of limitations has not yet fully run, but this proviso shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws.'

"SEC. 2. That this act shall be in force and effect from and after the date of its passage."

The VICE PRESIDENT. Is there objection to the immediate consideration of the bill?

Mr. LA FOLLETTE. Mr. President, I sincerely hope that this bill will pass. I think it is unfortunate that it was not reported from the Committee on the Judiciary earlier. The House transmitted it to the Senate on November 1, some two weeks ago, and upon that day it was referred to the Judiciary Committee of the Senate. I recognize the fact that the Senate has been holding sessions day and night upon the revenue bill. The consideration of that important measure required the attendance of Senators upon the sessions of the Senate. This made it exceedingly difficult to secure the attendance of Senators at committee meetings. This is very unfortunate, for I have seen it stated in the press that a large number of offenses against the criminal statute, which this bill amends, will escape punishment for criminal offenses against the Government, because the statute of limitations expired only a few days ago.

I have been informed—I do not know whether correctly informed or not, but I have been informed—that there are more than 2,000 cases connected with the Shipping Board where prosecutions would have been brought if the statute of limitations had not run against those offenses on last Saturday. I understand that its expiration on Saturday has relieved some 2,000 gentlemen whose cases have been investigated and who on the face of the record are prima facie guilty, at least as far as the investigation has proceeded. I repeat that I am informed that there are some 2,000 cases within the Shipping Board's organization where, upon the record, as shown by investigation, the parties were subject to prosecution under the section which this bill proposes to amend, and that the statute of limitations as to those cases expired on Saturday the 11th day of November.

Mr. WALSH of Montana. Mr. President, I hope the information which the Senator from Wisconsin has with respect to that matter is inaccurate. I shall be disposed to believe that it is. The crime charged against these people ordinarily is conspiracy; and although the conspiracy may have had its inception more than three years ago, the statute runs from the last act in carrying out the conspiracy. If it relates to war transactions, I should think it quite likely that the last act easily falls within the period of three years.

I rose particularly, however, to inquire whether attention has been given by those having this matter in charge to the statute so far as the civil liability is concerned. This bill affects only the criminal liability. I think we ought to safeguard the interests of the Government so far as the civil liability of these parties is concerned, as well as the criminal responsibility.

Mr. LA FOLLETTE. I quite agree with the Senator, if he will permit an interruption. This bill comes from the Committee on the Judi-

ciary, of which the Senator is a member. I do not know whether there is any bill before that committee which would amend the statute with regard to civil cases.

With respect to my statement regarding the information which I have respecting these cases, upon which the statute of limitations ran on last Saturday, I want to say that my information comes from gentlemen who have been connected with the Shipping Board and who have investigated these very cases, so that I think the information is well grounded.

Mr. WALSH of Montana. Of course, it may be. I merely express the hope that it is not.

Mr. LA FOLLETTE. I hope that it is not, of course.

Mr. WALSH of Montana. Three years would carry us back to November, 1918; and it is reasonable to assume that if the conspiracy did exist, some act in the effort to carry out that conspiracy would have taken place later than November, 1918. In other words, the entire purpose of the conspiracy could hardly have been accomplished as early as that.

Mr. NELSON. Mr. President, I will state that a Senate bill exactly similar to this, introduced by the Senator from Indiana [Mr. NEW], was reported by the Judiciary Committee on the 26th of September; but as the Senate was engaged in the consideration of the revenue bill, there was no opportunity to bring it up. This is a House bill, exactly like the Senate bill which was reported to the Senate. It has been passed by the House, and it is very important that it should pass the Senate now.

I do not think there are as many cases of this nature as the Senator from Wisconsin has intimated. There may be a few. Most of the frauds will consist of attempts upon the part of men who have contracts pending, and are trying to settle them, to impose upon the Government by fraudulent practices; and I think most of the cases involved are cases that will be within this law if we pass it.

Mr. NEW. Mr. President, I merely wish to add to what the Senator from Minnesota [Mr. Nelson] has said that I did introduce this exact bill in the Senate some time ago, and it has been on the calendar for some time. It is Order of Business No. 288. I introduced it at the direct request of the Attorney General, who told me that he at that time had information which led him to believe that there were certain cases of fraud against the Government, the prosecution of which would be soon barred by the operation of the statute of limitations.

I think it possible that some of the malefactors may have escaped in the interval that has elapsed between that time and this. The bill ought to be passed forthwith in order to prevent the possibility of anything further of the kind. While what the Senator from Montana says is true, that we ought also to provide for the recovery of damages in civil suits, I think it is best to provide for that in a separate bill and not to delay the passage of this one through any attempt to amend it in any way.

Mr. ASHURST. Mr. President, I rose a moment ago to secure an opportunity to express what the Senator from Montana [Mr. Walsh], who is also a member of the Committee on the Judiciary, has so well expressed. There have been suggestions that the Judiciary Committee, of which I am also a member, did not proceed with celerity; but let me remind the Senate that the Committee on the Judiciary reported the eligible bill on September 26. It was reported by the Senator from South Dakota [Mr. Sterling] on the order of the chairman, and it has been on the calendar as Order of Business No. 288 ever since that date. If any blame does attach, therefore, it can not justly fall upon the Judiciary Committee, because that committee proceeded with celerity and dispatch in reporting the bill to the Senate.

The PRESIDING OFFICER (Mr. Sutherland in the chair). Is there objection to the immediate consideration of the bill?

There being no objection, the Senate, as in Committee of the Whole, proceeded to consider the bill.

The bill was reported to the Senate without amendment, ordered to a third reading, read the third time, and passed.

The PRESIDING OFFICER. Without objection, Senate bill 2410, Order of Business 288, to amend section 1044 of the Revised Statutes, United States, relating to limitations in criminal cases, will be taken from the calendar and indefinitely postponed.

43 In United States District Court

[Title omitted.]

Præcipe for transcript of record

Dec. 16, 1925

CHARLES M. BATES, Esq.,
Clerk of the District Court of the United States
For the Northern District of Illinois, Eastern Division.

Please prepare a certified copy of the record of the court in the above-entitled cause, including therein the following:

1. October 3, 1924, order to file indictment.
2. October 3, 1924, indictment.
3. February 9, 1925, pleas of both defendants.
4. October 23, 1925, pleas of abatement filed by Frank Crozier and James W. McElvain.
5. November 3, 1925, order of hearing on oral demurrers.
6. December 16, 1925, demurrers of United States to pleas in abatement of Frank Crozier and James W. McElvain.
7. December 16, 1925, order overruling demurrers.
8. December 16, 1925, certificate of judge.
9. December 16, 1925, order granting leave to United States attorney for writ of error; allowance of writ of error; and citation of

the United States to the Supreme Court of the United States, and to file record in the United States Supreme Court.

44 10. December 16, 1925, petition of the United States attorney for writ of error and assignment of errors.

11. December 16, 1925, præcipe for record on writ of error.

12. December 16, 1925, citations.

13. December 22, 1925, order and stipulation.

EDWIN A. OLSON,
United States Attorney for the Northern District of Illinois, Eastern Division Thereof.

Dated at Chicago, Illinois, this 16 day of December, A. D. 1925.

45 In the Supreme Court of the United States

Statement of points to be relied upon and designation by plaintiff in error of parts of the record to be printed

Filed Jan. 19, 1926

The plaintiff in error, in contending that the District Court erred in sustaining the pleas in bar to the indictment, intends to rely upon the following:

(1) That the District Court erred in holding that prosecution was barred because the case fell within the three-year period of limitation prescribed by section 1321 of the revenue act of 1921 (act of November 23, 1921, ch. 136, 42 Stat. 227, 315) for "offenses arising under the internal-revenue laws."

(2) That the District Court erred in failing to hold that the case falls within the six-year period of limitation prescribed by the act of November 17, 1921 (ch. 124, 42 Stat. 220) for all offenses "involving the defrauding or attempts to defraud the United States."

The plaintiff in error believes that the entire record as filed will be necessary for the consideration of the errors above enumerated.

WILLIAM D. MITCHELL,
Solicitor General.

JANUARY 18, 1926.

Service of a copy of the foregoing statement of points is hereby acknowledged this —— day of January, 1926.

[Endorsed:] File No. 31608. Supreme Court U. S. October term, 1926. Term No. 885. The United States, plaintiff in error, vs. James W. McElvain et al. Statement of points to be relied upon and designation by plaintiff in error of parts of the record to be printed. Filed January 19, 1926.

[Endorsed on cover:] File No. 31608. N. Illinois, D. C. U. S. Term No. 885. The United States of America, plaintiff in error, vs. James W. McElvain and Frank Crozier. Filed January 13th, 1926. File No. 31608.

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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 266

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

v.

JAMES W. MCELVAIN AND FRANK CROZIER

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF ON BEHALF OF THE UNITED STATES

OPINION OF THE COURT BELOW

No opinion was delivered by the District Court for the Northern District of Illinois from which this case comes. The judgment and certificate of that court, however, appear at pages 10–11 of the record.

JURISDICTION

This case is before this Court on direct writ of error sued out on December 16, 1925 (R. 11), under the Criminal Appeals Act of March 2, 1907 (Ch. 2564, 34 Stat. 1246), to review a judgment of the District Court for the Northern District of Illinois,

filed December 16, 1925 (R. 10), sustaining separate pleas in bar entered by defendants (R. 6–7) to an indictment for conspiracy to defraud the United States (R. 1–5), overruling demurrers filed by the United States to said pleas (R. 9–10) and dismissing the proceedings.

The Criminal Appeals Act of March 2, 1907, *supra*, permits a direct writ of error to be taken on behalf of the United States—

> From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.

The separate pleas entered by defendants are variously denominated in the record. In the judgment they are referred to as pleas in bar, but in the judge's certificate and elsewhere in the record they are referred to as pleas in abatement.

The pleas themselves set up that the indictment was not found, nor information instituted, within three years next after the commission of the offense charged, nor within three years after any overt act charged in the indictment; that the defendants were not absent from the district from the time of the commission of the offense charged to the date of the return of the indictment, and have never been fugitives from justice. (R. 6–7.) The judgment of the court sustaining these pleas makes no reference to the statute of limitations; but in a certificate filed on the same date, December 16, 1925 (R. 11), the judge certifies that in entering

judgment he was of the opinion that at the time the indictment was returned the offense charged therein was barred by the statute of limitations; and that no question of an interpretation of the indictment was involved in his decision.

Under these circumstances it is immaterial how the pleas entered by defendants are denominated in the record. In *United States* v. *Barber,* 219 U. S. 72, this Court held that a judgment dismissing an indictment on the ground of the statute of limitations was a judgment sustaining a special plea in bar, and that the name given by counsel to the plea could not alter its nature. In *United States* v. *Rabinowich,* 238 U. S. 78, the record shows the defense was raised by a motion to quash and by a plea in abatement. This Court treated the motion and the plea as amounting to a special plea in bar.

There can be no question, therefore, but that this Court has jurisdiction in the case at bar.

QUESTION PRESENTED

Does the six-year period of the statute of limitations prescribed in the Act of November 17, 1921 (Ch. 124, 42 Stat. 220), apply to conspiracy to defraud the United States of income and profits taxes in violation of Section 37 of the Penal Code?

The court below held that it does not. The Government claims this holding is erroneous.

STATEMENT

On October 3, 1924, James W. McElvain, Frank Crozier, and Carley H. Hoy were indicted in the Northern District of Illinois for conspiracy to defraud the United States, in violation of Section 37 of the Penal Code.

The indictment was returned more than three years, but less than six years after the date of the last overt act charged.

The indictment (R. 1–5) sets forth the conspiracy at full length. In substance it charges that McElvain and Hoy were president and manager, respectively, of the Freeman Coal Mining Company, an Illinois corporation, and that Crozier was employed as attorney for the corporation, which was one required by law to file an income and profits tax return for the calendar year ended December 31, 1920; that defendants conspired and agreed together that they would prepare and cause to be prepared an incorrect, false, and fraudulent income and profits tax return for said calendar year on behalf of said corporation; that such fraudulent return was in fact prepared, sworn to by James W. McElvain as president of said corporation, and filed on March 14, 1921, with the Collector of Internal Revenue for the Eighth Collection District of Illinois in pursuance of the conspiracy, thereby defrauding the United States out of taxes to the amount of $54,680.10. Falsification of the books of the corporation for the purpose of concealing true

income was also charged as a part of said conspiracy. The indictment sets forth eight overt acts done by defendants in furtherance of their conspiracy.

On February 9, 1925, defendants were arraigned and each of them entered a plea of "not guilty" to the indictment. (R. 5.) On October 23, 1925, defendants James W. McElvain and Frank Crozier filed separate pleas in bar (R. 6–7) contending that the United States should not further prosecute the indictment against them because it was not found, nor information instituted, within three years after the commission of the offense charged therein. On December 16, 1925, the Government demurred to each of these pleas. (R. 9–10.)

On the same date the District Court entered judgment overruling the Government's demurrers, sustaining the pleas in bar entered by defendants, and dismissing the proceedings. (R. 10.) No reference to the statute of limitations is made in this judgment. However, by certificate (R. 11) filed on the same date that judgment was entered, the District Judge certified that, in entering his order dismissing the proceedings, he was of the opinion that at the time the indictment was returned the offense charged therein was barred by the statute of limitations and that no question of an interpretation of the indictment was involved in his decision.

From the judgment of the District Court the Government, on December 16, 1925, sued out this writ of error direct to this Court, under the Act of March 2, 1907 (Ch. 2564, 34 Stat. 1246), upon the ground that the court below had erroneously construed the statutes of limitations involved.

STATUTES INVOLVED

Section 37 of the Penal Code, under which this indictment was found, provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both.

Neither the judgment of the court (R. 10) nor the judge's certificate (R. 11) makes specific reference to the particular statute of limitations under which the court held the prosecution to be barred. It will be necessary, therefore, to set forth the several statutes of limitations to which reference was made at the hearing on the pleas in the court below.

The Act of November 17, 1921 (Ch. 124, 42 Stat. 220), amending Section 1044 of the Revised Statutes, provides—

That section 1044 of the Revised Statutes of the United States be amended so as to read as follows:

"SEC. 1044. No person shall be prosecuted, tried, or punished for any offense, not capital, except as provided in section 1046, unless the indictment is found, or the information is instituted, within three years next after such offense shall have been committed: *Provided, however,* That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years. This Act shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but this proviso shall not apply to acts, offenses, or transactions which are already barred by the provisions of existing laws."

SEC. 2. That this Act shall be in force and effect from and after the date of its passage.

(Revised Statutes 1046, referred to in the above-quoted Act, relates to offenses arising under *revenue* laws, and is not pertinent to the question here at issue.)

Section 1321 of the Revenue Act of 1921 (Ch. 136, 42 Stat. 227, 315), provides:

(a) That the Act entitled "An Act to limit the time within which prosecutions may be instituted against persons charged with vio-

lating internal revenue laws," approved July 5, 1884, is amended to read as follows:

"That no person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense: *Provided,* That the time during which the person committing the offense is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such proceedings: *Provided further,* That the provisions of this Act shall not apply to offenses committed prior to its passage: *Provided further,* That where a complaint shall be instituted before a commissioner of the United States within the period above limited, the time shall be extended until the discharge of the grand jury at its next session within the district: *And provided further,* That this Act shall not apply to offenses committed by officers of the United States."

(b) Any prosecution or proceeding under an indictment found or information instituted prior to the passage of this Act shall not be affected in any manner by this amendment, but such prosecution or proceeding shall be subject to the limitations imposed by law prior to the passage of this Act.

The Act of July 5, 1884, was further amended by Section 1010 of the Revenue Act of 1924 (Act of

June 2, 1924, Ch. 234, 43 Stat. 253, 341), to read as follows:

(a) The Act entitled "An Act to limit the time within which prosecutions may be instituted against persons charged with violating internal-revenue laws," approved July 5, 1884, as amended, is amended to read as follows:

"That no person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal-revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense: *Provided*, That for offenses involving the defrauding or attempting to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, the period of limitation shall be six years, but this proviso shall not apply to acts, offenses, or transactions which were barred by law at the time of the enactment of the Revenue Act of 1924: *Provided further*, That the time during which the person committing the offense is absent from the district wherein the same is committed shall not be taken as any part of the time limited by law for the commencement of such proceedings: *Provided further*, That the provisions of this Act shall not apply to offenses committed prior to its passage: *Provided further*, That where a complaint shall be instituted before a commissioner of the United States within the period above lim-

ited, the time shall be extended until the discharge of the grand jury at its next session within the district: *And provided further,* That this Act shall not apply to offenses committed by officers of the United States."

(b) Any prosecution or proceeding under an indictment found or information instituted prior to the enactment of the Revenue Act of 1921 shall not be affected in any manner by this section, nor by the amendment by the Revenue Act of 1921 of such Act of July 5, 1884, but such prosecution or proceeding shall be subject to the limitations imposed by law prior to the enactment of the Revenue Act of 1921.

SPECIFICATION OF ERROR TO BE URGED

The District Court erred in failing to hold that the case falls within the six-year period of limitations prescribed by the Act of November 17, 1921 (Ch. 124, 42 Stat. 220), for all offenses "involving the defrauding or attempts to defraud the United States * * * whether by conspiracy or not," and erred in sustaining the pleas in bar.

SUMMARY OF ARGUMENT

The offense charged under Section 37 of the Penal Code in this case does not arise under the internal revenue laws but under the general criminal laws of the United States. Defrauding the United States is an ingredient of the offense. Therefore the six-year period of limitations prescribed in the Act of November 17, 1921, applies.

There is no merit to the contention that that Act was intended by Congress to apply only to offenses growing out of the World War. The Act plainly on its face includes the offense herein charged and there is no need for resort to construction. Section 1010 of the Revenue Act of 1924 is not applicable to the offense here involved, as it is limited to offenses arising under the internal revenue laws. It is therefore unnecessary for this Court to attempt to reconcile the apparently conflicting provisions of that section.

This case in all of its angles is controlled by the recent case of *United States* v. *Noveck,* decided May 10, 1926, 46 S. Ct. 476.

ARGUMENT

I

THE SIX-YEAR PERIOD OF LIMITATIONS PRESCRIBED BY THE ACT OF NOVEMBER 17, 1921, AND NOT THE THREE-YEAR PERIOD IN SECTION 1321 OF THE ACT OF 1921, APPLIES TO THE CRIME OF CONSPIRACY TO DEFRAUD THE UNITED STATES IN ITS INTERNAL REVENUE, IN VIOLATION OF SECTION 37 OF THE PENAL CODE

In view of the plain language of the Act of November 17, 1921, *supra,* and the decision of this Court in *United States* v. *Noveck,* decided May 10, 1926, 46 S. Ct. 476, it is so obvious that the ruling of the court below is erroneous that the Government's discussion of the question will be quite brief.

Defendants in error were indicted under Section 37 of the Penal Code for conspiracy to defraud the United States in its internal revenue. The indictment was found October 3, 1924—more than three but less than six years after March 14, 1921, the date of the commission of the last overt act charged. At the time of the commission of the offense three years was the period of limitations for offenses "arising under the internal revenue laws." (Act of July 5, 1884, ch. 225, 23 Stat. 122, later reenacted and amended by Section 1321 of the Revenue Act of 1921 and Section 1010 of the Revenue Act of 1924.) At the same time the period of limitations for all crimes not capital arising under the general criminal laws (Section 1044 Revised Statutes) was likewise three years. However, before three years had elapsed after the commission of the offense the Act of November 17, 1921, *supra,* amended Section 1044 of the Revised Statutes and extended the period of limitations to six years for "offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not * * * and now indictable under any existing statutes." At the time of the enactment of the Act of November 17, 1921, the offense charged was indictable under existing statutes. Defendants pleaded in bar that the indictment was not found within three years after the commission of the offense charged, which pleas the court below sustained.

In the absence of anything in the record to disclose the reasoning by which the court held that prosecution was barred, it must be assumed that the pleas were sustained either on the ground (1) that the case fell within the three-year period of limitations prescribed in Section 1321 of the Revenue Act of 1921, *supra,* or (2) that Congress intended the Act of November 17, 1921, *supra,* to apply only to those frauds against the Government arising out of the war. Both of these grounds are untenable.

The recent case of *United States* v. *Noveck,* decided May 10, 1926, 46 S. Ct. 476, is decisive of the point that the three-year period of limitations prescribed in Section 1321 of the Revenue Act of 1921, *supra,* for "offenses arising under the internal revenue laws" can have no application to the case at bar.

In that case it was held that perjury, under Section 125 of the Penal Code, committed by making false oath to an income-tax return was not an offense arising under the internal revenue laws within the meaning of Section 1321 of the Revenue Act of 1921, *supra;* that hence the Act of November 17, 1921, *supra,* applied, but that as fraud is not an ingredient of the crime of perjury under the statute defining that offense the case fell within the three-year, rather than the six-year, period of limitations prescribed in said Act.

Other cases to the effect that a crime arises under the law by which it is defined and punished are *United States* v. *Hirsch,* 100 U. S. 33, and *United States* v. *Rabinowich,* 238 U. S. 78.

The reasoning in the *Noveck case* applies with full force to the case at bar. If the Act of November 17, 1921, applies to perjury it likewise applies to conspiracy. In the offense of conspiracy to defraud the United States of revenue, unlike perjury, under the rule of the *Noveck case,* the six-year period of the Act applies, because " defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense."

II

THE SIX-YEAR PERIOD OF LIMITATIONS PRESCRIBED BY THE ACT OF NOVEMBER 17, 1921, IS NOT LIMITED TO OFFENSES INVOLVING THE DEFRAUDING OF THE UNITED STATES GROWING OUT OF THE WAR

The second possible ground for the ruling of the court below is also readily disposed of. In the face of the specific provision that the period of limitations shall be six years in " offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner," it is idle to contend that Congress intended the Act of November 17, 1921, *supra,* to apply only to crimes growing out of the war.

The intent of Congress is so plain that nothing is left to construction. The rule that recourse may

not be had to legislative proceedings to vary the meaning of an unambiguous statute is too familiar and has too frequently been stated by this Court to require any extended citation. *Pennsylvania R. R. Co.* v. *International Coal Co.*, 230 U. S. 184; *Mackenzie* v. *Hare*, 239 U. S. 299.

Notwithstanding the unreliability of legislative proceedings in construing statutes, as a matter of fact the proceedings in Congress do not support the contention that the Act of November 17, 1921, *supra*, was intended to apply only to offenses growing out of the war. On the contrary, it appears clear (R. 15–31) that Congress was well aware and well informed of the scope and purpose of the Act and that the language employed was designed to cover all offenses involving the defrauding or attempting to defraud the United States, whether or not they grew out of the war. The "war frauds" furnished the occasion only for the enactment, not a measure of its scope.

The question, however, is really foreclosed by the opinion of this Court in *United States* v. *Noveck*, decided May 10, 1926, 46 S. Ct. 476. There, speaking of the Act of November 17, 1921, it is said:

> Its purpose is to apply the six-year period to every case in which defrauding or an attempt to defraud the United States is an ingredient under the statute defining the offense. There are several such offenses. Section 37 affords an illustration.

Section 37 is the section involved in this case.

III

SECTION 1010 OF THE REVENUE ACT OF 1924 HAS NO APPLICATION TO THE CASE AT BAR

The Government might well close here were it not probable that it will be urged upon this Court by defendants in error that the case at bar is affected by Section 1010 of the Revenue Act of 1924. Such is not the fact.

The indictment in this case was found on October 3, 1924. Prior to that time the existing statute of limitations (Section 1321 of the Revenue Act of 1921) for offenses "arising under the internal revenue laws" was reenacted as Section 1010 of the Revenue Act of 1924, *supra,* with the following apparently conflicting provisos:

> That no person shall be prosecuted, tried, or punished for * * * offenses arising under the internal revenue laws of the United States unless the indictment is found * * * within three years next after the commission of the offense: *Provided,* That for offenses involving the defrauding or attempting to defraud the United States * * * whether by conspiracy or not, and in any manner, the period of limitation shall be six years, *but this proviso shall not apply to acts, offenses, or transactions which were barred by law at the time of the enactment of the Revenue Act of 1924:* * * * *Provided further, That the provisions of this Act shall not*

apply to offenses committed prior to its passage * * *. (Italics ours.)

Should occasion require, the Government believes that by recourse to well-recognized rules of construction it would be possible to reconcile these apparently conflicting provisions, but that is unnecessary for the purpose of this case in view of the decision in *United States* v. *Noveck,* decided May 10, 1926, 46 S. Ct. 476.

As previously shown in Argument I of this brief, the *Noveck case* is conclusive of the proposition that the crime of conspiracy to defraud the United States does not " arise " under the internal revenue laws. Section 1010 of the Revenue Act of 1924 is confined to and applies only to the prosecution of offenses " arising under the internal revenue laws."

The words " whether by conspiracy or not " contained in a proviso of that section do not create a new substantive offense of conspiracy to defraud the United States of its internal revenue. The phrase is in a statute of limitations. Such a statute will not be construed as creating an offense separate and distinct from that defined by specific enactment. As stated by this Court in the *Noveck case,* " statutes will not be read to create crimes, or new degrees or classes of crime, unless the purpose so to do is plain."

Accordingly it is obvious that Section 1010 of the Revenue Act of 1924 can have no application to the case at bar. Its apparently conflicting provisos therefore do not concern us.

CONCLUSION

In view of the foregoing, it is respectfully submitted that the District Court erred in holding that prosecution of the offense charged in the indictment in this case was barred by the statute of limitations. The judgment should be reversed and the cause remanded for trial.

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SEWALL KEY,
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SEPTEMBER, 1926.

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SUPREME COURT OF THE UNITED STATES.

No. 266.—October Term, 1926.

United States of America, Plaintiff in Error, *vs.* James W. McElvain and Frank Crozier.	In Error to the District Court of the United States for the Northern District of Illinois.

[December 6, 1926.]

Mr. Justice Butler delivered the opinion of the Court.

October 3, 1924, defendants in error were indicted under § 37 of the Criminal Code (35 Stat. 1088, 1096) for conspiracy to defraud the United States in respect of its internal revenue. It is charged that they conspired to make a false income and profits tax return for 1920 for the Freeman Coal Mining Company, and that they caused a false return to be prepared, sworn to and filed, and committed various other overt acts. But no act is alleged to have been done later than March 14, 1921, more than three years prior to the indictment. Each of the defendants interposed a plea that the prosecution was barred because not commenced within three years after the offense. The district court, being of opinion that the applicable period of limitation had expired, entered judgment sustaining the pleas and discharging the defendants. The case is here under the Criminal Appeals Act, c. 2564, 34 Stat. 1246. *United States* v. *Barber,* 219 U. S. 72.

The question for decision is whether the applicable period is three years fixed by § 1044, Revised Statutes, or six years specified in a proviso added by the Act of November 17, 1921, c. 124, 42 Stat. 220.

It is necessary to consider a number of statutory provisions. Section 1044 provides: "No person shall be prosecuted . . . for any offense, not capital, except as provided in section 1046, unless the indictment is found or the information is instituted within three years next after such offense shall have been com-

mitted . . ." The defendants insist that the foregoing provision applies. The government contends that the case is covered by the proviso: "*Provided, however,* That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, and now indictable under any existing statutes, the period of limitation shall be six years." And the proviso was made applicable to offenses theretofore committed and not already barred.

Section 1046 provides: "No person shall be prosecuted . . . for any crime arising under the revenue laws, or the slave-trade laws of the United States, unless the indictment is found or the information is instituted within five years next after the committing of such crime."

The Act of July 5, 1884, c. 225, 23 Stat. 122, provides: "That no person shall be prosecuted . . . for any of the various offenses arising under the internal revenue laws of the United States unless the indictment is found or the information instituted within three years next after the commission of the offense, in all cases where the penalty prescribed may be imprisonment in the penitentiary, and within two years in all other cases. . . ."

This Act was amended by § 1321 of the Revenue Act of 1921, approved November 23, 1921, c. 136, 42 Stat. 315, which eliminated the two-year period so as to make the three-year period apply to all offenses. And it was further amended by § 1010 (a) of the Revenue Act of 1924, approved June 4, 1924, c. 234, 43 Stat. 341, which added the same proviso that was added to § 1044. This latest amendment, passed after the offense here charged, applied the six-year period to offenses thereafter committed against the internal revenue laws and covered by the proviso.

The offense charged is a conspiracy and not one arising under the internal revenue laws; and it is not within the Act of July 5, 1884, as amended. The period applicable is either three years under § 1044 or six years under the proviso. The government argues that defrauding the United States is an ingredient of the crime charged, and that the six-year period applies. It relies on *United States* v. *Noveck,* 271 U. S. 201. But that case is not like this one. The question there involved was whether an allegation in an indictment for perjury, (§ 125 Criminal Code) that the crime was committed for the "purpose of defrauding the United States" took the case out of the general clause of § 1044.

We held that the purpose stated was not an element of perjury as defined by statute, and that the extraneous fact alleged did not bring the case within the proviso. When the opinion is read in the light of the issue presented and decided, it furnishes no support for the government's contention here.

The proper application of the proviso is to be found upon a consideration of its scope as compared with that of the original section having regard to the other statutes of limitation. Section 1044 is comprehensive in language and purpose; it relates to all crimes, excepting only capital offenses and those arising under the revenue laws and slave trade laws. The purpose of the added proviso was to carve out a special class of cases. It is to be construed strictly, and held to apply only to cases shown to be clearly within its purpose. *United States* v. *Dickson*, 15 Pet. 141, 165; *Ryan* v. *Carter*, 93 U. S. 78, 83.

The proviso relates to substantive offenses involving defrauding or attempts to defraud the United States, whether committed by one or more or by conspiracy or otherwise. It does not extend to any offenses not covered by § 1044. The crime of conspiracy to commit an offense is distinct from the offense itself. The language of the proviso cannot reasonably be read to include conspiracy as defined by § 37. But if the proviso could be construed to include any conspiracies, obviously it would be limited to those to commit the substantive offenses which it covers. All the various offenses under the internal revenue laws are excepted from § 1044. The proviso relates to the preceding part of the section and can have no broader scope. *Wayman* v. *Southard*, 10 Wheat. 1. 30. And legislation contemporaneous with and subsequent to its passage shows that Congress intended that the proviso should not include such offenses. The proviso and § 1321 were considered by Congress at the same time. The latter was enacted six days after the proviso; it relates exclusively to offenses under the internal revenue laws. That section is to be applied rather than the general language of the proviso added to a statute that never covered such offenses. And § 1010 (a) which prescribes for them the same limitations as are fixed by the proviso, was unnecessary if the proviso already applied.

The three-year period fixed by § 1044 is applicable, and defendants' pleas were rightly sustained.

Judgment affirmed.